

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

FONDA J. HOUSTON,

Plaintiff,

v.

REGENTS OF THE UNIVERSITY OF  
CALIFORNIA, et al.,

Defendant.

No. C 04-4443 PJH

**ORDER GRANTING DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT**

Defendants' motion for summary judgment came on for hearing on March 22, 2006. Plaintiff appeared by her counsel Richard M. Rogers, and defendants appeared by their counsel Marcie S. Isom. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS defendants' motion as follows.

**BACKGROUND**

This is an employment case alleging disability discrimination, failure to accommodate, retaliation, and harassment. Plaintiff Fonda J. Houston was employed by defendant Regents of the University of California ("the Regents" or "the University") from 1986 until she was terminated on May 11, 2004.

For some period prior to March 2001, plaintiff worked as Accounts Receivable Supervisor for Public Safety and Transportation on the campus of the University of California at Berkeley ("UCB"). In that job, she supervised two to nine employees at any given time.

1 On March 1, 2001, plaintiff began working in UC's Office of the President ("UCOP")  
2 as an Administrative Specialist in the Policy and Planning Unit of the Information  
3 Resources and Communication ("IR&C") Department. Her primary duty in the new job was  
4 to provide general accounting and support for the IR&C Department. Plaintiff testified that  
5 she sought a transfer because she wanted to complete her bachelor's degree, and didn't  
6 want a job where she had the responsibility of supervising other people. There is no  
7 evidence that plaintiff had any performance problems prior to her employment in UCOP.

8 Plaintiff was hired for the position by Principal Analyst Bjoern Jeker ("Jeker"), who  
9 was also supposed to be plaintiff's new supervisor. However, Jeker left UCOP on March  
10 16, 2001. After that date, plaintiff's supervisor was defendant Heidi Hoffman ("Hoffman"),  
11 the Administrative Services Manager.

12 About three weeks after plaintiff began working in the IR&C Department, she began  
13 complaining about her new job, primarily because she felt that it was not challenging  
14 enough. In May 2001, plaintiff began reporting directly to Terrence Ireland ("Ireland"), who  
15 was newly hired and who reported directly to Hoffman. Plaintiff told Hoffman and Ireland  
16 that she thought the job was "beneath her" and that she planned to return to her prior  
17 department at UCB. During her first two or three months in IR&C, she began taking  
18 administrative leave with pay to interview for other positions.

19 Plaintiff states in her declaration that "[t]he job was not what I expected, and Heidi  
20 Hoffman's management style, particularly her yelling, upset me and made me ill." She  
21 claims that around May 2001, she began experiencing stomach pains and various intestinal  
22 problems, and that at some point she also began experiencing panic attacks. Eventually  
23 these conditions developed into the illnesses that provide the basis for her claim of  
24 disability – irritable bowel syndrome (IBS) and anxiety/panic condition. Plaintiff asserts that  
25 these conditions were triggered by Hoffman's "yelling" at her because she was seeking  
26 other employment. Plaintiff also claims that Hoffman "micro-managed her," and that  
27 everything she (plaintiff) did came under "heightened scrutiny."

28 Plaintiff made numerous requests for sick leave and for leave for other, non-medical

1 reasons. Many of the requests were made on the day of the absence, or even after the  
2 fact. In the fall of 2001, after conferring with Hoffman, Ireland spoke to plaintiff about the  
3 need to schedule planned absences in advance. According to Ireland, plaintiff responded  
4 that he could not tell her when she could or could not miss work.

5 On May 23, 2002, Ireland issued plaintiff's annual performance evaluation for the  
6 period March 1, 2001, through February 28, 2002. In the evaluation, Ireland noted that  
7 plaintiff mostly met, and sometimes exceeded, expectations for her specific job  
8 responsibilities (with the exception of "[m]aintain organized files for both reconciled and  
9 unreconciled invoices" and "[m]aintain copies of appropriate documentation in files"), and  
10 he recognized strengths in her overall performance. However, under "Areas for  
11 Improvement," he stated,

12 Fonda tends not to go beyond the defined scope of her job. She approaches  
13 her responsibilities from the perspective that she only does "what she is told."  
14 While she performs the basic responsibilities of her position well, she could  
be even more effective if she were more pro-active – asking questions, using  
her own judgment – rather than responding to direction.

15 Fonda has poor attendance, including an unacceptable number of  
16 unscheduled absences. Some of these can be attributed to circumstances  
17 beyond her control (such as sick leave, family leave, etc.), but many are the  
18 result of appointments or other events that could have been anticipated. She  
should strive to get approval for all planned absences as far in advance as  
possible, and to keep the number of unscheduled absences to a minimum.

19 Plaintiff took exception to these comments, and, according to Ireland, considered  
20 that she had been inappropriately and unfairly "written up." In the space on the evaluation  
21 for "employee comments," plaintiff stated that she had requested a job description on her  
22 first day on the job, and had been provided with an "outdated" and "generic" job description.  
23 She claimed, essentially, that she was being unfairly evaluated on her job performance  
24 when she had never received an accurate job description. In response to the charge of  
25 excessive absenteeism, plaintiff responded,

26 I have a medical condition that I was diagnosed with while working in this  
27 position. I have a note from my doctor on file. My doctor say's [sic] that my  
28 condition is brought on by stress and anxiety. For health reasons, I have  
found the need to remove myself from this (sometime) chaotic working  
environment. If any of my absences could have been anticipated I would

1 have requested the time off well in advance to avoid receiving (on some  
2 occasions) leave without pay. In my past positions attendance has never  
been a problem.

3 She ended with a promise to "continue to do what is expected of me while adhering to  
4 University guidelines and procedures," and to "make every effort to convey to my  
5 supervisor any obligations that I may have that will require my absence from work." She  
6 added, however, that "things happen beyond my control" because of the fact that she was  
7 a single mother of three and a full-time college student.

8 On May 29, 2002, less than a week after receiving the performance evaluation,  
9 plaintiff sent Hoffman an e-mail requesting that the evaluation be removed from her  
10 personnel file or revised to delete the comment that "she only does what she is told" and  
11 the comments regarding her spotty attendance. Plaintiff argued that she had shown  
12 initiative in her performance of her job duties, citing to examples of new procedures she  
13 had implemented, and reiterated that she awaited "clarity" regarding her duties and  
14 responsibilities overall. In response to the charge of excessive absenteeism, plaintiff wrote,

15 As far as my attendance is concerned, I did use (necessary) time away from  
16 work. In this position, I have allowed people to upset me to the point that  
17 their mere presence causes me undo [sic] stress. I have come to the  
18 realization that I cannot run away from confrontations. I need to address  
19 adversities head on. I am sure that if an attendance policy was made  
20 available I would have come to this realization sooner. I would have seen  
21 what was expected of me and as a result I would have dealt with work related  
issues sooner then [sic] now and saved my accrued hours and avoided a  
negative evaluation. . . . I don't understand how my attendance could be rated  
as "poor." I don't know what standards to which I was being measured  
against. All assignments and deadlines were reached and I was not informed  
of any complaints of people not being able to reach me. As a result, I feel an  
attendance rating of "poor" is unjustified.

22 Although plaintiff stated in her May 23, 2002, comments on the performance  
23 evaluation that she had "a medical condition that I was diagnosed with while working in this  
24 position" and that she had "a note from my doctor on file," there is no evidence of any  
25 diagnosis or doctor's "note" as of the date of the evaluation. Her statement that her  
26 condition was "brought on by stress and anxiety" was repeated in the May 29, 2002 letter,  
27 but was not supported with any medical documentation.

28 Following several medical appointments during the succeeding four weeks, plaintiff

1 advised Ireland that she had a “serious medical condition,” although she still did not reveal  
2 the diagnosis, the severity of the condition, or the anticipated duration of the recovery  
3 period. Ireland states that when he suggested that plaintiff seek counseling for the “stress,”  
4 plaintiff told him she found his suggestion “offensive and degrading.” She testified in her  
5 deposition that she believed Ireland “was trying to be offensive and degrading,” and that the  
6 suggestion that she seek counseling was offensive and degrading because she hadn’t  
7 demonstrated the need to seek counseling and because Ireland was not a medical  
8 professional who was qualified to assess her mental or emotional state.

9 Ireland also arranged for plaintiff to be provided with workers’ compensation claim  
10 forms and a UC Family Medical Leave packet, which contained a statement of employee  
11 rights under the FMLA, copies of UC’s leave of absence policy and the procedures for  
12 obtaining leaves of absence, plus various forms for medical leave certification. Plaintiff  
13 apparently applied for workers’ compensation on May 29, 2002.

14 On June 12, 2002, in a meeting with Manager of Employee-Labor Relations and  
15 Vocational Rehabilitation Services, Shar Caldwell (“Caldwell”), plaintiff asked to be moved  
16 to a different position, preferably at UC, as a “reasonable accommodation” for her health  
17 problems. She subsequently made numerous requests to be “transferred” or “moved  
18 away” from Hoffman and Ireland.

19 Plaintiff subsequently went on FMLA leave for the period June 17, 2002, through  
20 August 21, 2002. On August 5, 2002, she was evaluated by Danilo V. Lucila, M.D., in  
21 connection with her workers’ compensation claim. Dr. Lucila, a psychiatrist, examined  
22 plaintiff with regard to psychiatric issues. He diagnosed panic disorder without  
23 agoraphobia, occupational problems, and “[i]rritable bowel syndrome, self-reported.” He  
24 stated that the panic disorder had developed in June 2002, following the issuance of the  
25 May 2002 performance evaluation – “a performance evaluation that she did not agree with.”  
26 He noted that plaintiff “has been in treatment for this, and apparently has been making  
27 progress,” and was being “released to return to duty with no restrictions effective mid-  
28 August 2002.” He also noted that plaintiff “has an occupational problem.” Specifically,

1 “[s]he is dissatisfied with her job, and this has been an ongoing issue since it started in May  
2 2001.” He stated that while “[t]his is an issue of concern, . . . in itself [it] is not a mental  
3 illness or disorder.” He found no work-related injury, but recommended that plaintiff  
4 continue with psychiatric treatment.

5 On August 22, 2002, plaintiff returned to work half-time. On her return, she again  
6 spoke to Caldwell to request an accommodation for her anxiety/panic condition, and also  
7 spoke to Ireland about the problem. She testified in her deposition that she told Caldwell  
8 and Ireland that there was too much noise in her work area, that she couldn’t deal with the  
9 constant interruptions and micro-managing, that she needed to be moved out of that area.  
10 She told them she wanted to be moved away from Hoffman – that she could not work  
11 under Hoffman’s management, because it was “triggering anxiety.” She asked for a  
12 transfer “back to Berkeley.” Caldwell asked her for some type of doctor’s note about her  
13 condition, and plaintiff testified that she told Caldwell that she could not get any information  
14 from Kaiser because she had exceeded the allowable number of visits and “was no longer  
15 being seen in Kaiser psychiatric.” She later met with Roger Howland (“Howland”), the  
16 Coordinator of Vocational Rehabilitation Programs at UC, and told him she wanted a  
17 transfer to UCB, or to be moved anywhere away from her present work environment.

18 Plaintiff worked half-time for the period August 22, 2002, through September 6,  
19 2002, and then returned to FMLA leave from September 9, 2002, through October 13,  
20 2002. Plaintiff’s physician released her to return to work full-time, with no restrictions, on  
21 October 14, 2002.

22 During the period December 1, 2002, through mid-January 2003, Ireland became  
23 concerned because of a number of grave errors and omissions in plaintiff’s work. In  
24 addition, plaintiff continued with the pattern of frequent, unapproved absences. According  
25 to Hoffman, plaintiff missed over 280 hours (35 days) of work between October 15, 2002  
26 (when she returned from FMLA leave) and January 30, 2003. In an effort to assist plaintiff  
27 with her workload, Hoffman approved plaintiff’s request to change her work hours and to  
28 have responsibility for three of her accounts transferred to two of plaintiff’s co-workers.

1 Ireland states in addition that during plaintiff's absences, he reviewed her in-basket to  
2 ensure that critical payments were taken care of, and had another co-worker take over  
3 plaintiff's job of General Ledger reconciliations; and that when plaintiff returned from her  
4 leaves, he offered her additional administrative support to assist her with her workload.

5 On January 28, 2003, Ireland issued plaintiff a counseling memo, citing deficiencies  
6 in her work performance and also citing excessive absences. Ireland wrote that plaintiff  
7 needed to improve in the areas of "productivity" and in the area of "unscheduled absences."  
8 With regard to productivity, Ireland noted that "[i]nvoices and check requests have not been  
9 processed in a timely manner, which has resulted in service termination, late notices and  
10 intervention by other IR&C and UCLA staff." With regard to absences, Ireland noted  
11 that "[t]here have been numerous instances during the past 2 months of unscheduled  
12 absences that demonstrate a continued unwillingness to comply with University policy and  
13 expectations identified in your previous performance evaluation." Ireland provided  
14 examples of the kinds of behavior that had precipitated the counseling memo, and set  
15 specific expectations in each area.

16 On May 20, 2003, as part of a new request for FMLA leave, plaintiff informed Ireland  
17 for the first time that she had been diagnosed with IBS. (It appears that plaintiff was initially  
18 diagnosed with IBS in mid-2002, but she had not previously disclosed the diagnosis to her  
19 supervisors at the University.) The certification plaintiff provided at this time was a  
20 statement from her doctor – Raymond L. Davis at Kaiser – dated May 20, 2003, stating that  
21 plaintiff "may require" one or two days of medical leave per month to deal with the IBS. No  
22 additional restrictions were listed, and there was no showing of a need for extensive time  
23 off or for some other sort of accommodation. Ireland approved this request of up to two  
24 days per month. In addition, at plaintiff's request, the department approved a 10%  
25 reduction in plaintiff's appointment,<sup>1</sup> which allowed her to take a day off every other week.

26 On August 11, 2003, plaintiff filed an administrative charge with the California  
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28 <sup>1</sup> This reduction was part of the Staff and Academic Reduction in Time ("START")  
program, which, according to plaintiff, was implemented by the University to cut costs.



1 Department of Fair Employment and Housing ("DFEH") the Equal Employment Opportunity  
2 Commission ("EEOC"), against the Regents, Hoffman, and Ireland, alleging disability  
3 discrimination, harassment because of disability, and retaliation for taking leave under the  
4 FMLA/CRLA, during the period March 2001 to January 28, 2003. With regard to  
5 harassment, plaintiff alleged only that "[b]etween March 2001 and January 28, 2003, I was  
6 subjected to work environment harassment by Terrence Ireland and Heidi Hoffman and  
7 written up on performance." With regard to retaliation, she asserted, "In June 2002, I was  
8 placed on leave under California family rights Act (CFRA/FMLA) due to my physical  
9 disability, irritable bowel syndrome." She adds, "Due to this condition, I was off work for  
10 many days during the period and Mr. Ireland, Principal Administrative Analyst, wrote me up  
11 and stated that it was a period of low performance and poor attendance." She did not state  
12 any facts in the administrative charge to support a claim of discrimination, apart from the  
13 claim of harassment.

14 On August 20, 2003, plaintiff and Hoffman met to discuss a recent exchange of e-  
15 mails between the two of them. In Hoffman's opinion, plaintiff's e-mails were disrespectful  
16 and bordered on insubordination. The e-mails concerned payments for invoices for cell  
17 phones used by employees. Hoffman began the exchange by complaining to plaintiff that  
18 employee David Wasley's cell phone had been disconnected because the bill hadn't been  
19 paid. Although the payment of invoices was one of plaintiff's job duties, plaintiff essentially  
20 responded, "It's not my job." Hoffman insisted that it was, and plaintiff's final message to  
21 Hoffman included the statement, "At this point I am considering your actions as harassment  
22 and I would like it to cease."

23 The August 20, 2003, meeting between Hoffman and plaintiff lasted for about ten  
24 minutes. Hoffman claims that plaintiff interrupted her frequently, and was loud, rude, and  
25 disrespectful. According to Hoffman, when she asked plaintiff to stop interrupting her,  
26 plaintiff responded, "I'm not a child for you, as if you gonna talk down to me." Hoffman  
27 claims that plaintiff ended the meeting abruptly, saying that she had filed a complaint  
28 against Hoffman with the DFEH for "harassing" her because of her medical problems.



1 Plaintiff also said she didn't want to talk to Hoffman again unless someone "associated with  
2 her claim" was also present.

3 Hoffman called a meeting on September 9, 2003, with plaintiff, Ireland, and plaintiff's  
4 representative (Rhonda Rice). The purpose of the meeting was to present plaintiff with a  
5 letter of warning dated September 8, 2003, concerning her performance and recent  
6 behavior. At the meeting, Hoffman told plaintiff that she had repeatedly failed to ensure  
7 timely payment of invoices, which had generated complaints from and disruption of service  
8 throughout UCOP and caused unnecessary work for plaintiff's co-workers. Hoffman then  
9 provided plaintiff with specific examples of the failure to pay invoices in a timely manner.

10 In the letter of warning, Hoffman listed three specific performance issues – the  
11 August 5, 2003, disconnect of David Wesley's cell phone due to non-payment of the  
12 invoice, which was the second time this employee's phone had been disconnected for non-  
13 payment; an August 11, 2003, request from a mailroom supervisor to process a \$45,000  
14 check for the postage meter, which check was not issued until September 2, 2003; and the  
15 September 2, 2003, disconnect of the satellite cable service due to non-payment of the  
16 invoice, which had been given to plaintiff in July 2003. The letter stated that these failures  
17 to pay invoices and the related performance problems had generated complaints and  
18 problems, and caused unnecessary work for plaintiff's co-workers. The letter stated further  
19 that Hoffman found plaintiff's "continuing defensiveness and dismissive attitude toward  
20 these problems unacceptable" and reiterated that Hoffman expected plaintiff to process  
21 invoices for her area in a timely manner.

22 In the letter, Hoffman also commented on the e-mail exchange regarding the  
23 payment of the invoices for the cell phones. She described plaintiff's behavior in the  
24 August 20, 2003, meeting as "rude and disrespectful," and that plaintiff's responses were  
25 "insubordinate." Hoffman reminded plaintiff that she expected plaintiff to be courteous and  
26 professional in communicating with her (Hoffman) and with her other colleagues. The letter  
27 concluded with the statement that "failure to show an immediate, substantial and sustained  
28 improvement in the level of your work and in your communications with all IR&C staff

1 members will result in further disciplinary action, up to and including dismissal.” The letter  
2 also stated that plaintiff had “the right to request reviews of this action in accordance with  
3 Staff Personnel Policy, #70.”

4 At the September 9, 2003, meeting, after she was presented with the letter of  
5 warning, plaintiff read from a prepared note. According to Hoffman, plaintiff complained  
6 that she had not been provided with an “attendance policy” or “written expectations;” that  
7 she had a permanent disability and had an appointment with a “state medical examiner;”  
8 and that her disability had not been properly accommodated. Plaintiff asserted that she  
9 was being subjected to continuous “e-mail and verbal harassment” by both Hoffman and  
10 Ireland, and that as a result of the work environment, she had “suffered memory loss” and  
11 an “inability to focus.” Plaintiff ended the meeting by stating that she had nothing further to  
12 say, that she did not feel well, and that she was going home.

13 On September 10, 2003, plaintiff submitted a formal internal complaint of  
14 discrimination to UC Associate Vice President Judy Boyette. In the complaint, plaintiff  
15 requested “a formal review of an unwarranted and unjustified Letter of Warning.”

16 I feel my rights under Policy 12, Nondiscrimination in Employment; Section A  
17 of the Personnel Policies for Staff Members has [sic] been violated. I feel as  
18 though I am being discriminated against because of my mental and physical  
19 disability. I initiated a complaint on 7/22/03 and one was filed on 8/11/03 with  
20 the Fair Employment and Housing Agency. In these complaints I listed Heidi  
Hoffman and Terrence Ireland as the discriminators. I don’t think they are  
being fair in evaluating my performance standards. I have said on several  
occasions that I am not able to perform at the same pace as prior to my  
disability. . . .

21 I feel my rights under Policy 81; Reasonable Accommodation of the  
22 Personnel Policies for Staff Members has [sic] been violated. I requested a  
23 review for reasonable accommodations. I feel a reasonable accommodation  
24 would include a new work site. I have made attempts to familiarize the  
25 people that I work with and for about my medical condition (which can  
become disabling at anytime). I have spoken to Shar Caldwell on several  
occasions in regards to my work place environment and leaving. I have never  
been advised by anyone at UCOP about the steps in the process to be  
considered for reasonable accommodations. . . .

26 In addition, I feel the Letter of Warning that I received is in retaliation for the  
27 complaint that I filled [sic] with the Fair Employment & Housing and the  
28 EEOC. I would like the University of California, Office of the President to  
execute a fact-finding investigation. . . .

1 Plaintiff then described the onset of her IBS and anxiety disorder. She claimed that  
2 her health began to decline as early as one month after she began working in Hoffman's  
3 unit, when Hoffman discovered that plaintiff wanted a transfer to another job and "started  
4 screaming at me, '[Y]ou should have never taken this position if you did not plan on  
5 staying.'" Plaintiff asserted that "[t]here have been constant stares, sneers and tension  
6 from [Hoffman] and her staff directed at me from that point to the present." She claimed  
7 that "stress" aggravates her condition, and asserted that "[i]t has been very stressful  
8 working in the Administrative Unit of IR&C." She closed by again requesting "a fact-finding  
9 investigation into the above issues and policy violations."

10 The Regents' "Personnel Policies for Staff Members" or "PPSM" allows an employee  
11 to file a complaint "about a specific management act which is alleged to have adversely  
12 affected the employee's existing terms or conditions of employment." Pursuant to Human  
13 Resources Procedure 70 ("PPSM 70"), UCOP provides a multi-step process for  
14 adjudicating complaints made regarding discrimination in employment, retaliation, and  
15 failure to provide reasonable accommodation. Paragraph VII of PPSM 70 provides the  
16 procedure for "Submission of Employee Request for Review," which describes the method  
17 of filing a complaint. Paragraph IX sets forth the steps in the "Professional and Support  
18 Staff (PSS) Complaint Resolution Process."

19 At Step I of the complaint resolution process, the department head issues a written  
20 decision. If the employee is not satisfied with the Step I decision, he/she may submit a  
21 written appeal for further review (Step II) to the Manager of UCOP Employee and Labor  
22 Relations. If either the University or the employee requests that a fact-finder be appointed  
23 to review the complaint, the complaint is forwarded to a fact-finder appointed by the  
24 Manager, UCOP Employee and Labor Relations. The appointed fact-finder must be from  
25 outside the department and/or the reporting line in which the complaint arises. The fact-  
26 finder then conducts an investigation to determine the appropriate facts, which may include  
27 meeting with each party in the complaint, and submits a written report to the Manager,  
28 UCOP Employee and Labor Relations. The report is forwarded to the Director, UCOP

1 Human Resources, who then either issues a final and binding decision or remands the  
2 matter back to the fact-finder for additional information and/or clarification.

3 For certain employee complaints (including nondiscrimination in employment and  
4 reprisal for utilizing the complaint resolution process), where those complaints are not  
5 satisfactorily resolved in the written decision at Step II, or where no written decision is  
6 issued, such decisions may be appealed in writing to Step III. Employees may then submit  
7 appeals for a final and binding decision at Step III before a hearing officer, unless the  
8 employee has requested a fact-finding review at Step II, in which case there is no hearing  
9 and the Step II written decision is final and binding.

10 On December 29, 2003, Kristine Hafner ("Hafner"), Associate Vice President, IR&C,  
11 provided plaintiff with a written "Step I Response" to plaintiff's PPSM formal complaint of  
12 September 10, 2003. Hafner noted that plaintiff had asserted that Policy 12  
13 (nondiscrimination in employment) and Policy 81 (reasonable accommodation) had been  
14 violated, and that she had been retaliated against. Hafner stated that the complaint was  
15 denied, and set forth the reasons.

16 With regard to the discrimination claim, Hafner stated that none of the medical forms  
17 or certifications indicated that plaintiff was incapable of performing all the essential  
18 functions of her job, but rather, all clearly indicated that plaintiff could perform her regularly  
19 assigned duties. She pointed to the "lone exception" – a July 10, 2002, certification by J.  
20 Stern, Ph.D., which indicated that plaintiff was incapable of performing all the functions of  
21 her job, but which stated no restrictions and indicated no necessary accommodations.  
22 Hafner also found no indication that plaintiff had ever been disciplined or reprimanded for  
23 use of sick leave or FMLA leave.

24 Hafner noted that the comments on the May 22, 2002, performance evaluation  
25 regarding attendance problems were limited to plaintiff's frequent unscheduled absences  
26 unrelated to sick leave or FMLA leave, and that those absences had caused delays in  
27 service to the Department's customers and had also resulted in increased workload for  
28 plaintiff's colleagues and supervisor. She noted that the department had issued a

1 counseling memo on January 28, 1993, setting forth the performance problem areas,  
2 providing reasonable suggestions for correcting the problems, and articulating clear  
3 ongoing performance expectations, which plaintiff should have taken as an opportunity to  
4 improve her performance in the indicated areas.

5 With regard to the failure to accommodate claim, Hafner stated that she had  
6 reviewed all the medical documentation submitted by plaintiff or her medical providers, and  
7 noted that while Dr. Davis had indicated on May 20, 2003, that plaintiff had a "serious  
8 medical condition" which "may require" 1-2 days off per month (which request had been  
9 granted), each of the medical providers including Dr. Davis had authorized plaintiff to work  
10 at her customary job duties without restrictions. Hafner also found that the department had  
11 granted every request plaintiff had made for time off for doctors' appointments, sick leave,  
12 and FMLA leave.

13 Hafner noted in addition that the University had allowed plaintiff numerous hours of  
14 paid administrative leave to attend job interviews within the University, and had  
15 accommodated requests for changes in plaintiff's work hours and had transferred  
16 responsibility for several accounts from plaintiff to another accounting specialist. In  
17 addition, she noted that IR&C had requested and obtained counseling support from HR to  
18 facilitate better communication between plaintiff and Hoffman. With regard to plaintiff's  
19 request to work in a different location, Hafner stated that given the nature of the job  
20 responsibilities plaintiff was hired to perform, and the relatively small size of the IR&C  
21 administrative unit, there was no basis to change plaintiff's reporting relationship or her  
22 work location, nor would such changes be feasible.

23 With regard to the claim of retaliation for filing a DFEH/EEOC complaint, Hafner  
24 stated that the written letter of warning was based solely on plaintiff's well-documented  
25 performance problems, the unacceptable nature of plaintiff's behavior, and the disrespectful  
26 and uncooperative manner in which plaintiff communicated with her supervisors and  
27 colleagues. Hafner found no evidence that Hoffman had issued the letter of warning in  
28 retaliation for plaintiff's filing an outside agency complaint.

1           Meanwhile, on September 26, 2003, plaintiff was evaluated by David Cherry, M.D.,  
2 in connection with her workers' compensation claim. In his report, issued on October 24,  
3 2003, Dr. Cherry diagnosed panic disorder without agoraphobia, various gastrointestinal  
4 ailments (IBS, gastroesophageal reflux disease, and lactose intolerance), and "conflict with  
5 supervisor." He stated that plaintiff's panic and anxiety symptoms were "related to  
6 stressors at work," and that her "current symptoms and disability are substantially related to  
7 her fears about not being able to find another job because of her performance evaluation in  
8 June 2002." He also noted that if the performance evaluation had been made in good faith,  
9 plaintiff's disability would not meet the standard for industrial causation of disability.

10           Dr. Cherry found that plaintiff had impairment in one area of the work function – the  
11 ability to maintain a work pace appropriate to a given workload and the ability to perform  
12 complex or varied tasks – but also stated that his evaluation was based entirely on  
13 plaintiff's subjective report of the impairments, as there were "no objective factors of these  
14 impairments." Dr. Cherry felt that plaintiff might benefit from a course of medication to treat  
15 the panic symptoms, but noted that she was unlikely to agree, because of her "dislike of  
16 medication," reflected by the fact that she was no longer taking the medications previously  
17 prescribed for the gastrointestinal symptoms. He also indicated that plaintiff might benefit  
18 from more frequent visits with her therapist.

19           As for recommended treatment, Dr. Cherry wrote, "Ms. Houston has returned to  
20 work and I believe this is appropriate without any specific work restriction." He deferred  
21 specific recommendations for treatment of the gastrointestinal symptoms to an internal  
22 medicine physician.

23           On December 16, 2003, plaintiff was evaluated by David B. Waldman, M.D., a  
24 gastroenterologist. In his report dated January 7, 2004, Dr. Waldman diagnosed a "history  
25 of" IBS, "gastroesophageal reflux disease," and work-related stress, but stated that the  
26 issue of the psychiatric stress claim and disability was not the subject of his report. He  
27 found that plaintiff's reported symptoms were "consistent with a pattern of irritable bowel  
28 syndrome, with no prior history of gastrointestinal disease." He added, "It is with medical



1 probability, as a consequence of work-related stress, Ms. Houston has developed an  
2 irritable colon syndrome, and this condition is industrial in nature.” He found that she had  
3 no work restrictions “on the workers’ A to G schedule,” but added that in terms of her IBS,  
4 she “warrants a preclusion from extreme psychological stress.”

5 On January 6, 2004, Ireland gave plaintiff a written performance evaluation for the  
6 period March 2002 to November 2003. Ireland gave plaintiff an overall performance rating  
7 of “did not meet expectations.” He noted that while she met expectations in the “monthly  
8 recharges” and “SBS processing,” she did not perform her other major job responsibilities –  
9 invoice processing, Filemaker updates and reconciliation, telecom processing, and filing –  
10 in a way that met expectations.

11 Under “Areas for Improvement,” Ireland stated,

12 In terms of the basic responsibilities of her position, Fonda needs to address  
13 the serious delays in invoice processing, Filemaker entry, reconciliation and  
14 filing. Additionally, to avoid service terminations in the future, she needs to be  
15 more diligent in monitoring past due balances and in resolving questions  
16 regarding payables. (For example, Fonda indicated that she didn’t process a  
17 particular payable, which later resulted in termination of the service, because  
18 she didn’t think we could pay from a “billing statement” as opposed to an  
19 invoice. However, the statement listed current charges, amount due, and a  
20 remittance address. In any event, she could have contacted A/P at UCLA to  
21 verify whether it could be paid, or she could have looked in the previous  
22 year’s files to see how the previous payment had been handled.)

23 Fonda has also become increasingly combative and disrespectful in her  
24 interactions with her co-workers and department management. This behavior  
25 is unacceptable in the workplace and must change. Fonda is expected, as  
26 are all departmental employees, to communicate and conduct themselves in  
27 a professional manner, and to be courteous and helpful, maintain a positive  
28 attitude, and support the team concept.

29 In the space on the evaluation for “employee comments,” plaintiff attached a  
30 statement dated January 6, 2004, in which she asserted,

31 This evaluation is a fabrication and/or an exaggeration of what actually  
32 occurred. I filed a complaint with the Fair Employment & Housing and the  
33 EEOC in July 2003 and a complaint with UCOP Human Resources AVP  
34 Boyette in November 2003 in regards to the management and discrimination  
35 actions and or decisions that occurred during this period and the last  
36 evaluation period. I have worked for the University of California for 15 years;  
37 this department is the first to give me unfavorable evaluations. My  
38 employment record with the University should speak for itself.

39 On February 24, 2004, Howland sent plaintiff a letter regarding the interactive



1 process, noting that the obligation was “mutual” in that plaintiff must provide information  
2 that is reasonable and necessary for the University to determine what accommodation it  
3 should give her. He again requested medical documentation supporting her request for a  
4 transfer – which plaintiff had yet to provide. Howland stated that the University was  
5 providing plaintiff with an effective accommodation, as described by Dr. Davis (1-2 days off  
6 per month). He wrote, “If you disagree, then please help us. The University must have  
7 clear medical information on a different accommodation that is necessary and effective to  
8 enable you to perform the essential functions of your position. If your doctors are unwilling  
9 to provide this information, we cannot proceed further.”

10 On March 11, 2004, plaintiff requested a “Step II” fact finder to review her PPSM  
11 complaint. In the letter, plaintiff stated that her complaint of violation of Policy 12  
12 (discrimination) pertained not only to the May 23, 2002, Performance Evaluation, but also  
13 to the January 28, 2003, Counseling Memo and the September 8, 2003, Letter of Warning,  
14 and that her complaint was based on “the lack of a clear attendance policy.” She claimed  
15 that she did not know what was required of her in order to alert her supervisor to her health  
16 issues. She stated that she had advised “him” (probably referring to Ireland) that she “was  
17 not feeling very well” and that she had “sought medical attention.” She claimed that she  
18 had not been able to obtain a personal physician at Kaiser until May 2002, and that prior to  
19 that time no confirming diagnosis had been made.

20 She asserted that at the point at which she realized she was not able to do her job at  
21 UC, she had exhausted the allotted number of psychiatric visits permitted at Kaiser. In  
22 addition, however, she was hoping to find another job, and did not want a “documented  
23 psychiatric disability.” She claimed that she had been “forced” to disclose this information  
24 because of adverse personnel actions that were taken against her. She also asserted that  
25 she was not familiar with the complaint resolution process, and claimed that she had not  
26 been informed of the steps or actions that are taken in conducting an investigation.

27 At some point in March 2004, plaintiff asked Howland if she could move to a “less  
28 noisy” area. Howland states in his declaration that he suggested a different cubicle in an

1 area with less traffic, but plaintiff refused because she claimed the cubicle was too small  
2 and too close to Hoffman's office.

3 On April 7, 2004, Howland received a "visit verification" from plaintiff's doctor, Dr.  
4 Raymond Davis, which indicated that plaintiff needed to avoid "extreme psychological  
5 stress." The next day, Howland sent Dr. Davis a letter requesting clarification as to what he  
6 meant by "extreme psychological stress." In the letter, Howland stated that plaintiff was  
7 already working reduced hours, at her request, but added that "[t]here has been no  
8 guidance as required for reasonable accommodation, for any specific work restrictions that  
9 the employer can evaluate to determine if reasonable accommodation is possible." He  
10 added that "[t]he University does not want to assume disability if none exists." He  
11 requested "a clear definition of any restrictions and/or preclusions."

12 On April 12, 2004, Dr. Davis responded to Howland, stating that the phrase "please  
13 help patient avoid extreme psychological stress" was intended to facilitate communication  
14 between plaintiff and "her workplace," and that it "should not preclude her ability to continue  
15 to work in her usual job." He added that if there were further questions, Howland should  
16 ask plaintiff to sign a medical release. Howland asserts, however, that he had previously  
17 requested plaintiff's consent to contact Kaiser directly regarding her request for  
18 accommodation, and had provided plaintiff with a copy of a Kaiser Permanente  
19 authorization form, but that plaintiff had informed him she would not sign the authorization.

20 At some point in early April 2004, plaintiff allowed Howland to contact her treating  
21 psychologist, Dr. Sheila Byrns (a private practitioner, not affiliated with Kaiser), to ascertain  
22 whether Dr. Byrns thought plaintiff required any restrictions or limitations. Dr. Byrns was  
23 unable to provide any information, however, as she had just started working with plaintiff.  
24 Howland then wrote Dr. Byrns a letter, on April 12, 2004, summarizing his phone  
25 conversation with her, identifying the accommodations the Regents had provided to date,  
26 and asking whether there were any additional restrictions or accommodations that Dr.  
27 Byrns thought were necessary.

28 On April 16, 2004, Hoffman sent plaintiff a notice that the Regents intended to

1 terminate her employment. According to Hoffman, despite the discussions she and Ireland  
2 had had with plaintiff about her performance, plaintiff's insubordination and absenteeism  
3 continued to present problems that negatively affected the department. The letter stated  
4 that the termination would be effective May 6, 2004, and that it was based on "your  
5 continuing performance problems, including your failure to deposit checks in a timely  
6 manner, insubordination, failure to follow instructions regarding reconciliation, not entering  
7 orders into the financial system in a timely manner, delays with processing invoices, and  
8 ongoing issues with filing." The letter also stated that in accordance with PPSM Policy 64,  
9 Section C, Notice and Decision, plaintiff had a right to respond, orally or in writing, within 8  
10 days, to Associate VP Kristine Hafner.

11         Shortly after Hoffman sent plaintiff the April 16 letter, Howland received a letter from  
12 Dr. Byrns requesting that he transfer plaintiff to another location as a reasonable  
13 accommodation for her IBS and the accompanying stress. Howland states that he believes  
14 that this is the first and only written request from a medical provider concerning a transfer.  
15 At the time, plaintiff was on an undocumented leave of absence.

16         Howland asserts that over the course of two years, either he or Caldwell had met  
17 with plaintiff on approximately eight separate occasions to discuss her desire to move out  
18 of the IR&C Department. He states that on at least five of those occasions, they had asked  
19 plaintiff to provide some medical certification supporting the request, but that she failed to  
20 provide anything at all until after she had received the notice of termination. Howland  
21 claims that plaintiff insisted that the doctors' examination reports related to her workers'  
22 compensation claim – the reports by Drs. Lucila, Cherry, and Waldman – were sufficient to  
23 support the request for a transfer. He says he told plaintiff that those reports were not  
24 sufficient because they addressed the workers' comp claim only in general terms, and did  
25 not show that a transfer to a different location would have been an effective or reasonable  
26 accommodation. To the contrary, all the reports indicated that plaintiff could return to work  
27 "with no restrictions."

28         Howland also states that at the time plaintiff requested to be moved, there was no

1 other position available within the IR&C Department for which she was qualified. He adds  
2 that he did not have the authority or the ability to bypass the normal application and  
3 interview process, or to move an employee from UCOP to a different UC campus, because  
4 there is no reciprocity between UCOP and other UC campuses. He stated that he had  
5 never moved a UCOP employee to another UC campus as an accommodation, because  
6 there is no viable internal policy for such a move.

7 On May 5, 2004, Dr. Byrns released plaintiff to return to work “with accommodations  
8 – i.e., not to be returned to a hostile work environment.” She provided no further guidance,  
9 and at that point the University was already processing plaintiff’s termination.

10 On May 7, 2004, Kristine Hafner issued plaintiff a formal notice of termination. She  
11 noted that plaintiff had sent an e-mail on April 22, 2004, regarding the April 16, 2004, letter,  
12 and that she and plaintiff had also talked on the phone on April 23, 2004, during which time  
13 Hafner offered to extend the time for plaintiff to respond to the April 16, 2004, letter. Hafner  
14 also noted that on April 29, 2004, she had received an additional e-mail from plaintiff in  
15 which she acknowledged receipt of the April 26, 2004, letter. Hafner stated, however, that  
16 plaintiff had not provided any additional information responding to the specific reasons for  
17 the termination (stated in the letter of intent), but rather wrote at length informing Hafner  
18 that the University had failed to accommodate her appropriately. She added that the  
19 termination would become final, as plaintiff had provided no explanation or defense  
20 regarding the reasons specified in the notice of intent to terminate. She also advised  
21 plaintiff that she had the right to file a formal grievance within 30 days in accordance with  
22 PPSM 70 – Complaint Resolution.

23 Meanwhile, in response to plaintiff’s request for a Step II fact finder, the University  
24 had appointed Julia Armstrong to conduct the investigation. Armstrong issued her 12-and-  
25 a-half-page-report on June 1, 2004, and the University provided plaintiff with a copy.  
26 Rosemary Monroe, UCOP’s Chief HR Officer, advised plaintiff that she was in agreement  
27 with Armstrong’s conclusions, that plaintiff’s complaint was denied, and that “[t]his decision  
28 is final and binding in accordance with the University of California, Office of the President,

1 Human Resource Procedure 70 – Complaint Resolution.”

2 Armstrong states that in the course of her investigation, she interviewed eight  
3 individuals including plaintiff, Caldwell, Ireland, and Hoffman. She also reviewed the  
4 complete complaint file (including the documents referenced in the above narrative),  
5 plaintiff's personnel files at UCOP and UCB, many e-mail messages to and from the  
6 principal parties, plaintiff's monthly attendance reports, plaintiff's individual time reporting  
7 slips, medical information submitted by plaintiff, letters denying plaintiff's workers'  
8 compensation and disability claims, and PPSM 12, 43, and 81.

9 With regard to the alleged violation of PPSM 12 (discrimination), Armstrong found no  
10 facts to support the allegation. She stated that Ireland's evaluation of plaintiff's  
11 performance from March 1, 2001, to February 29, 2002, was accurate, in that plaintiff's  
12 unplanned absences for scheduled activities constituted an area of performance that  
13 needed improvement.

14 Armstrong found plaintiff's demands for an “attendance policy” and a written list of  
15 performance expectations – and her assertion of no responsibility for the failings in her  
16 performance – to be disingenuous at best. Armstrong noted that plaintiff understood what  
17 was expected of her in her job well enough to have met or exceeded those expectations in  
18 her first year in the position; and that as an experienced University employee who had  
19 supervised staff, she should have been familiar with the University's practice of using the  
20 job responsibilities contained in the position description as a foundation for assessing an  
21 employee's performance, should have been aware of the University's policy of requesting  
22 leave approval in advance for scheduled activities, and should have been aware of the  
23 normal hours of the work day at the University. She noted that even after plaintiff was  
24 provided with copies of the University's leave policy and the IR&C operating guidelines, her  
25 pattern of being absent for scheduled activities without prior approval continued.

26 Armstrong noted that Ireland had issued the May 23, 2002, performance evaluation  
27 and the January 28, 2003, counseling memo before he had been notified that plaintiff had a  
28 certified disability. In addition, Ireland had excluded plaintiff's sick leave absences from his

1 performance evaluation, and thus her health problems were not a consideration in his  
2 assessment. Armstrong added, however, that until Dr. Davis had provided the certification  
3 dated May 20, 2003, that plaintiff suffered from IBS, plaintiff had conveyed no information  
4 to the University regarding a disability or any job restrictions; and that after Dr. Davis  
5 provided the certification, plaintiff's request for 1-2 days off per month was granted.

6 Armstrong found no evidence that the September 8, 2003, letter of warning was  
7 issued in retaliation for plaintiff's having filed a complaint with DFEH. She found the tone of  
8 plaintiff's responses to Hoffman's e-mail messages immediately preceding the issuance of  
9 the letter of warning to be combative and brusque – not what a supervisor should expect  
10 from a subordinate. She stated that plaintiff had not provided a copy of the recording she  
11 allegedly made of the August 20, 2003, meeting with Hoffman, and that therefore the only  
12 contemporaneous evidence of what transpired was Hoffman's e-mail to plaintiff. Based on  
13 that, Armstrong found that the description of plaintiff's behavior during the meeting, as well  
14 as the documented problems with her performance, provided a non-discriminatory basis for  
15 the letter of warning.

16 With regard to the alleged violation of PPSM 81 (failure to provide reasonable  
17 accommodation), Armstrong found no facts to support the allegation. She noted that  
18 plaintiff first requested accommodation in the form of a transfer to a position on the UCB  
19 campus or to a different office within UCOP on June 12, 2002. However, at that time, she  
20 presented no medical certification or recommendation in support of such accommodation.  
21 The UCOP policy states that "[t]he employee is responsible for requesting accommodation  
22 and for providing medical documentation to assist in understanding the nature of the  
23 employee's functional limitations. This documentation may be subject to confirmation by a  
24 University-appointed licensed healthcare provider."

25 Armstrong noted that most of the Kaiser Permanente "visit verification" forms, which  
26 plaintiff submitted to explain her medical absences from work, did not state that she had a  
27 permanent disability that placed restrictions on her ability to perform the functions of her  
28 job. Armstrong found that all the temporary accommodations recommended by plaintiff's

1 providers when she returned from leave in 2002 were granted, and that she had been  
2 cleared for work without restriction once the periods of temporary accommodation came to  
3 an end.

4 Armstrong noted further that Dr. Davis' May 20, 2003, certification of plaintiff's IBS  
5 and his recommended permanent accommodation (1-2 days off per month) for her return to  
6 work as of that date were the first notices received by IR&C that required reasonable  
7 accommodation under PPSM 81. That request was granted, as was plaintiff's later request  
8 for a 10% reduction in time. Armstrong found that plaintiff's absences from May 20, 2003,  
9 until she filed her complaint on September 10, 2003, were far in excess of the  
10 accommodation recommended by Dr. Davis. She notes that the monthly attendance  
11 reports for May 22 to September 10, 2003, record 217 hours of absence from work.

12 On June 1, 2004, Rosemary Monroe, UCOP's Chief Human Resources Officer,  
13 provided plaintiff with a copy of Ms. Armstrong's report, and stated that she was in  
14 agreement with Ms. Armstrong's conclusions. Ms. Monroe wrote,

15 Based on her report as well as my review of the case, I find no violation of the  
16 University of California Policies and Procedures, 12, Nondiscrimination in  
17 Employment, or 81, Reasonable Accommodations, nor do I find evidence of  
18 retaliation for complaints filed with the Department of Fair Employment and  
19 Housing (DFEH) and Equal Employment Opportunity Commission (EEOC).  
Your complaint is, therefore, denied. This decision is final and binding in  
accordance with University of California, Office of the President, Human  
Resources Procedure 70 – Complaint Resolution.

20 On June 2, 2004, plaintiff filed a formal internal complaint regarding her termination.  
21 According to UCOP Labor Relations Specialist Karen Yun ("Yun"), plaintiff failed to provide  
22 further information to assist in the processing of the complaint when requested to do so.  
23 After repeated attempts to obtain the required information from plaintiff, Yun closed the  
24 June 2, 2004, complaint on August 17, 2004.

25 Plaintiff filed this action on September 13, 2004, in the Superior Court of California,  
26 County of Alameda, against the Regents and Hoffman. In the first amended complaint,  
27 plaintiff alleges the following claims: (a) disability discrimination, harassment, retaliation,  
28 and failure to accommodate, in violation of the Americans With Disabilities Act (ADA), 42



U.S.C. § 12101, et seq.; (b) disability discrimination, harassment, retaliation, failure to accommodate, failure to engage in a good-faith interactive process, and failure to prevent discrimination and harassment, in violation of the California Fair Employment and Housing Act (FEHA), California Government Code § 12940; (c) discrimination, harassment, and retaliation for taking time off under the Family Medical Leave Act (FMLA), 29 U.S.C. § 2601, et seq., and the California Family Rights Act (CFRA), California Government Code § 12945.2.<sup>2</sup>

At the hearing on defendants' motion, plaintiff's counsel advised the court that plaintiff was withdrawing the ADA discrimination and harassment claims, as well as the ADA claims of failure to accommodate and failure to engage in a good-faith interactive process. Thus, the only ADA claim remaining in the case is the retaliation claim.

Defendants now seek summary judgment on all claims.

### DISCUSSION

#### A. Legal Standard

Summary judgment is appropriate when there is no genuine issue as to material facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

Material facts are those that might affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id.

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other

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<sup>2</sup> The only cause of action alleged against "[d]efendants" as opposed to "[d]efendant UC" is the fifth cause of action, which asserts that "[d]efendants harassed and retaliated against [p]laintiff because of her disability and/or because she took time off pursuant to Cal. Gov. Code § 12945.2, in violation of Gov. Code §§ 12945.2, 12940(h), and 12940(j)." At the hearing on defendants' motion, plaintiff's counsel clarified that the only claims asserted against Hoffman are the claims of harassment and retaliation.

1 than for the moving party. On an issue where the nonmoving party will bear the burden of  
2 proof at trial, the moving party can prevail merely by pointing out to the district court that  
3 there is an absence of evidence to support the nonmoving party's case. Id. If the moving  
4 party meets its initial burden, the opposing party must then set forth specific facts showing  
5 that there is some genuine issue for trial in order to defeat the motion. See Fed. R. Civ.  
6 P. 56(e); Anderson, 477 U.S. at 250.

7 "To show the existence of a 'genuine' issue, . . . [a plaintiff] must produce at least  
8 some significant probative evidence tending to support the complaint." Smolen v. Deloitte,  
9 Haskins & Sells, 921 F.2d 959, 963 (9th Cir. 1990) (quotations omitted). The court must  
10 view the evidence in the light most favorable to the non-moving party. United States v. City  
11 of Tacoma, 332 F.3d 574, 578 (9th Cir. 2003). The court must not weigh the evidence or  
12 determine the truth of the matter, but only determine whether there is a genuine issue for  
13 trial. Balint v. Carson City, 180 F.3d 1047, 1054 (9th Cir. 1999). If the nonmoving party  
14 fails to show that there is a genuine issue for trial, "the moving party is entitled to judgment  
15 as a matter of law." Celotex, 477 U.S. at 323. Regardless of whether plaintiff or defendant  
16 is the moving party, each party must "establish the existence of the elements essential to  
17 [its] case, and on which [it] will bear the burden of proof at trial." Id. at 322.

18 B. Defendants' Motion for Summary Judgment

19 Defendants argue that because plaintiff failed to seek judicial review of the  
20 University's final decision, her claims are barred by the failure to exhaust judicial remedies.  
21 Defendants also contend that summary judgment should be granted on the claim of  
22 disability discrimination because plaintiff's termination had no connection with her alleged  
23 disabilities, and because she cannot show that the University's articulated reason for the  
24 termination was pretextual; that summary judgment should be granted on the harassment  
25 claim because plaintiff cannot show that defendants subjected her to unwelcome  
26 harassment; that summary judgment should be granted on the retaliation claims because  
27 plaintiff cannot show a causal link between her protected activities and her termination, and  
28 cannot show pretext; that summary judgment should be granted on the claim of failure to

1 accommodate because the University accommodated plaintiff's only disability (IBS),  
 2 because accommodation was not required for "stress/anxiety," and because a transfer  
 3 away from a supervisor is not a reasonable accommodation; that summary judgment  
 4 should be granted on the claim of failure to engage in a good-faith interactive process  
 5 because there is no viable claim of failure to accommodate; and that summary judgment  
 6 should be granted on the claim of CFRA/FMLA retaliation/interference because the  
 7 evidence shows that the University granted all plaintiff's requests for CFRA/FMLA leave,  
 8 and that her termination was based on performance problems, not on excessive absences.

9       1. Exhaustion of Judicial Remedies

10       Defendants argue that plaintiff's claims are barred by her failure to successfully  
 11 exhaust her judicial remedies by seeking judicial review (writ of mandate) of the Regents'  
 12 final decision on her internal complaint of discrimination, failure to accommodate, and  
 13 retaliation. Under California law, a party who has received an adverse ruling in a "quasi-  
 14 judicial" proceeding must first succeed in overturning the quasi-judicial action before  
 15 pursuing her claim. Westlake Community Hosp. v. Superior Court, 17 Cal. 3d 465, 484  
 16 (1976); see also Ishimatsu v. Regents of Univ. of Calif., 266 Cal. App. 2d 854, 862 (1968).

17       California courts have made clear that a public employee may initially choose  
 18 between filing either an internal grievance or an FEHA administrative claim, but that  
 19 employees who pursue an internal grievance to a final decision are not permitted "a second  
 20 'bite of the procedural apple'" by pursuing an action for damages as well. Schifando v. City  
 21 of Los Angeles, 31 Cal. 4th 1074, 1090-91 (2003). In other words, while a public employee  
 22 may choose to bypass the internal administrative process, she has the burden of  
 23 exhausting judicial remedies if she chooses to pursue the internal process. Page v. Los  
 24 Angeles County Probation Dept., 123 Cal. App. 4th 1135, 1142-44 (2004).

25       When a public employee "pursues administrative civil service remedies, receives an  
 26 adverse finding, and fails to have the finding set aside through judicial review procedures,  
 27 the adverse finding is binding on discrimination claims under FEHA." Johnson v. City of  
 28 Loma Linda, 42 Cal. 4th 61, 76 (2000); see also Williams v. Housing Auth. of City of Los

1 Angeles, 121 Cal. App. 4th 708, 724-25 (2004) (when an employee pursues an internal  
2 administrative remedy, the employee must timely seek judicial review from an adverse  
3 administrative decision by seeking a writ of mandate before filing a civil action – a  
4 procedure known as “exhaustion of judicial remedies”).

5 Plaintiff opposes the motion, asserting that Schifando holds that an employee  
6 alleging FEHA claims does not have to exhaust internal remedies. In Schifando, the  
7 California Supreme Court held that an employee of the City of Los Angeles was not  
8 required to exhaust internal remedies before filing a FEHA claim – in other words, that the  
9 exhaustion of internal remedies was not a prerequisite to the filing of the employee’s FEHA  
10 complaint. However, contrary to plaintiff’s assertion, Schifando also held that an employee  
11 who has elected to pursue internal remedies and has obtained a “final decision” must  
12 exhaust those remedies by judicially challenging the final decision before proceeding on a  
13 FEHA claim. Schifando, 31 Cal. 4th at 1090-91.

14 The court in Schifando affirmed its earlier opinion in Johnson v. City of Loma Linda,  
15 where it ruled that because the plaintiff had exhausted the remedies offered by the City of  
16 Loma Linda, but had not exhausted judicial remedies by seeking judicial review of the City’s  
17 final decision, the City’s findings were binding on subsequent FEHA claims. Schifando, 31  
18 Cal. 4th at 1090. The court explained that “refusing to give binding effect to those quasi-  
19 judicial findings would ‘undermine the efficacy of such proceedings, rendering them in  
20 many cases little more than rehearsals for litigation.’” Id. (quoting Johnson, 24 Cal. 4th at  
21 72).

22 As the Ninth Circuit has explained, “California has made it quite clear that a  
23 discharged civil servant who elects an administrative forum for review of his or her  
24 termination must succeed in overturning that administrative decision through the judicial  
25 mandamus review procedure prior to filing a suit for damages on claims arising out of the  
26 termination.” Miller v. County of Santa Cruz, 39 F.3d 1030, 1038 (9th Cir. 1994).

27 Plaintiff’s second argument is that the cases do not support defendant’s argument  
28 that the “Step II” fact-finding was “quasi-judicial.” However, California courts have regularly

1 reaffirmed that the Regents' personnel proceedings are "quasi-judicial" in nature. Based on  
 2 the grant of power in article IX, section 9 of the California Constitution, "policies established  
 3 by the Regents as matters of internal regulation may enjoy a status equivalent to that of  
 4 state statutes." Bunnett v. Regents of Univ. of Calif., 35 Cal. App. 4th 843, 848 n.2 (1995).  
 5 In Ishimatsu, "it was first held that the constitutional grant of power to the University of  
 6 California includes the grant of quasi-judicial powers. That decision has found general  
 7 acceptance." Bunnett, 35 Cal. App. 4th at 848 n.2 (citing Ishimatsu, 198 Cal. App. 3d at  
 8 864); see also Apte v. Regents of Univ. of Calif., 198 Cal. App. 3d 1084, 1090-91 (1988).

9 Plaintiff contends, however, that because the University did not hold a formal  
 10 evidentiary hearing on her internal complaint, the administrative proceeding cannot be  
 11 considered "quasi-judicial." However, "quasi-judicial" proceedings are defined in California  
 12 by the nature of the issues presented and decided, not whether a formal hearing is  
 13 involved. Bunnett, 35 Cal. App. 4th at 848.

14 [J]udicial review via administrative mandate is available only if the decision  
 15 resulted from a proceeding in which by law 1) a hearing is required to be  
 16 given, 2) evidence is required to be taken, and 3) discretion in the  
 17 determination of facts is vested in the agency. [By contrast] ordinary mandate  
 18 is used to review adjudicatory actions or decisions when the agency was not  
 19 required to hold an evidentiary hearing.

20 Id. (citations and quotations omitted). Here, the procedures were governed by UCOP's  
 21 Human Resources Procedure 70, issued in connection with the Regents' Personnel  
 22 Policies for Staff Members. There is no provision in PPSM 70 for a formal evidentiary  
 23 hearing as part of the Step II fact-finding. PPSM requires that the fact-finder

24 conduct an investigation as appropriate to determine the pertinent facts,  
 25 which may include meeting with each party to the complaint individually  
 26 and/or jointly. The Fact-Finder shall then submit a written report to the  
 27 Manager, UCOP Employee and Labor Relations (or designee) . . . .  
 28 The fact-finding report shall contain the following information:

- A clear statement of the issues under review;
- The position of opposing parties;
- A summary of the information received during the investigation;
- Findings of fact; and

1 – Conclusions, including policy violations, if any.

2 PPSM 70 does permit the employee to request a formal hearing at Step III, but only if the  
3 employee has not requested a fact-finding review at Step II. In this case, plaintiff opted to  
4 request an “appeal” of the initial decision via Step II fact-finding, rather than seek an appeal  
5 in a Step III hearing.

6 Plaintiff contends that under U.S. v. Utah Constr. & Min. Co., 384 U.S. 394 (1966), a  
7 final decision in an administrative proceeding cannot have collateral estoppel effect unless  
8 the procedure offered an “adequate opportunity to litigate.” In Miller, the Ninth Circuit held  
9 that, whether based on claim preclusion or issue preclusion, “unreviewed findings of a state  
10 administrative tribunal are entitled to preclusive effect” in a subsequent action in federal  
11 court only if the fairness requirements of Utah Construction are met – that is, the  
12 administrative agency must have acted in a judicial capacity, the agency must have  
13 resolved disputed issues of fact properly before it, and the parties must have had an  
14 adequate opportunity to litigate. Miller, 39 F.3d at 1032-33 (citing Utah Constr., 384 U.S. at  
15 422). The threshold inquiry in such a case is whether the state administrative proceeding  
16 was conducted with sufficient safeguards to be equated with a state court judgment. Id. at  
17 1033.

18 Here, plaintiff argues that “an investigation is not a hearing,” and asserts that  
19 because she did not have an adequate opportunity to litigate her claims in an evidentiary  
20 hearing, the Utah Construction minimum fairness requirements were not met. As noted  
21 above, however, plaintiff chose to proceed through the Step II fact-finding process, without  
22 a hearing, rather than through the Step III appeal process, with a hearing. Moreover, while  
23 the Step II fact-finding process did not involve a hearing, it was conducted by a neutral fact-  
24 finder who gathered evidence, reviewed all the records, interviewed witnesses (including  
25 plaintiff), and issued a report summarizing all the evidence and making findings based on  
26 that evidence. Having received a final determination of no discrimination, no failure to  
27 accommodate, and no retaliation for filing the DFEH/EEOC charge, and having failed to  
28 have that decision set aside through judicial review procedures, plaintiff is now barred from

attempting to assert the claims that were raised in the internal complaint. See Risam v. County of Los Angeles, 99 Cal. App. 4th 412, 419-22 (2002).

The court finds that the motion must be GRANTED as to the FEHA claims for disability discrimination, retaliation for having filed the administrative charge with DFEH, failure to accommodate, and failure to engage in a good-faith interactive process. All these claims were raised in plaintiff's September 10, 2003, formal internal complaint, and in her March 11, 2004, request for a "Step II" fact finder. Ms. Armstrong, the fact-finder, found no evidence to support any of these claims, and plaintiff did not seek judicial review of the University's final decision.

It appears that defendants are asserting that all "claims" – under both federal and state law – are barred because plaintiff did not exhaust judicial remedies. The court's interpretation, however, is that only the state-law claims that were raised in the internal complaint are barred under this theory. Plaintiff did not raise the FEHA harassment claim or the FEHA claim of retaliation for having taken medical leave in the internal complaint. To the extent that the harassment claim can be viewed as distinct from the discrimination or retaliation claims, that claim is not barred. The FEHA (CFRA) retaliation claim is essentially the same as the FMLA retaliation claim, and will be considered in that section.

Moreover, in Johnson, the California Supreme Court held that Title VII claims are not precluded by state administrative decisions that have not been judicially reviewed on their merits because the EEOC is only required to give "substantial weight" to such findings. The Johnson court cited University of Tennessee v. Elliott for the proposition that "Congress did not intend unreviewed state administrative proceedings to have preclusive effect on Title VII claims." Johnson, 24 Cal. 4th at 75 (citing University of Tennessee v. Elliott, 478 U.S. 788, 795 (1986)). Based on this reasoning, and the fact that the law applicable to Title VII claims is generally applicable to claims under the ADA, the court finds that the ADA retaliation claim is not barred by plaintiff's failure to exhaust judicial remedies.

## 2. Disability discrimination claim

As an alternative basis for granting summary judgment on the FEHA disability



1 discrimination claim, the court finds that plaintiff has provided no evidence that raises a  
2 triable issue with regard to whether the Regents' stated reasons for terminating her were  
3 pretextual.

4 Because of the similarity between state and federal employment discrimination laws,  
5 California courts look to pertinent federal precedent when applying California statutes. Guz  
6 v. Bechtel Nat'l, Inc., 24 Cal. 4th 317, 354 (2000). In a disparate treatment case, the  
7 plaintiff must show that intentional discrimination was the determinative factor in the  
8 adverse employment action. Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).  
9 There are two ways of proving intentional discrimination – direct evidence, and indirect or  
10 circumstantial evidence. Guz, 24 Cal. 4th at 354.

11 Direct evidence is evidence that proves the fact of discriminatory animus without  
12 inference or presumption. Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1221 (9th Cir.  
13 1998). In most cases, such as the present one, there is no direct evidence of  
14 discrimination by the employer, and discrimination claims must be proved indirectly  
15 (circumstantially). Guz, 24 Cal. 4th at 354. In such cases, discrimination claims are  
16 analyzed under an allocation of burdens of production and proof, based on the model set  
17 forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

18 Under the McDonnell-Douglas framework, the burden of production first falls on the  
19 plaintiff to make out a prima facie case of discrimination. The specific elements of a prima  
20 facie case may vary depending on the facts. Guz, 24 Cal. 4th at 355 (citing Texas Dep't of  
21 Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)). Generally, the plaintiff must  
22 provide evidence showing that she was a member of a protected class, that she was  
23 qualified for the position sought or was performing competently in the position she held,  
24 that she suffered an adverse employment action, such as termination or demotion or denial  
25 of an available job, and that some other circumstance suggests discriminatory motive. Id.;  
26 see also St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993); McGinest v. GTE  
27 Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2004).

28 If the plaintiff establishes a prima facie case, a presumption of discrimination arises.

1 Guz, 24 Cal. 4th at 355 (citing St. Mary's Honor Center, 509 U.S. at 506). The burden of  
 2 production then shifts to the employer, who must present evidence sufficient to permit the  
 3 factfinder to conclude that the employer had a legitimate, nondiscriminatory reason for the  
 4 adverse employment action. Id. at 355-56. If the employer sustains this burden, the  
 5 presumption of discrimination disappears, and the plaintiff must demonstrate that the  
 6 employer's articulated reason is a pretext for unlawful discrimination, either directly by  
 7 persuading the court that a discriminatory reason more likely motivated the employer or  
 8 indirectly by showing that the employer's proffered reason is unworthy of credence.  
 9 Burdine, 450 U.S. at 256; see also Aragon v. Republic Silver State Disposal, Inc., 292 F.3d  
 10 654, 658-59 (2002) (en banc).

11 The ultimate burden of persuasion on the issue of actual discrimination remains with  
 12 the plaintiff. Guz, 24 Cal. 4th at 356 (citing St. Mary's Honor Center, 509 U.S. at 518). "If  
 13 the employer presents admissible evidence either that one or more of plaintiff's prima facie  
 14 elements is lacking, or that the adverse employment action was based on legitimate,  
 15 nondiscriminatory factors, the employer will be entitled to summary judgment unless the  
 16 plaintiff produces admissible evidence which raises a triable issue of fact material to the  
 17 defendant's showing." Caldwell v. Paramount Unified School Dist., 41 Cal. App. 4th 189,  
 18 203 (1995) (citing Burdine, 450 U.S. at 255, n.8).

19 To establish a prima facie case of disability discrimination under FEHA, a plaintiff  
 20 must show that she suffered from a disability, that she was otherwise qualified to do the  
 21 job, and that she was subjected to adverse employment action because of her disability.  
 22 Diaz v. Fed. Express, 373 F. Supp. 2d 1034, 1063 (C.D. Cal. 2005); see also Snead v.  
 23 Metropolitan Prop. & Cas. Ins. Co., 237 F.3d 1080, 1087 (9th Cir. 2001).

24 Here, defendants do not dispute that plaintiff may be disabled, although they do  
 25 argue that only the IBS qualifies as a "disability."<sup>3</sup> Nevertheless, they contend that plaintiff

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27 <sup>3</sup> Defendants contend that stress and anxiety that are triggered by a conflict with a  
 28 supervisor cannot establish a "disability" if the employee can still do the same job under a  
 different supervisor.

1 cannot establish a prima facie case of disability discrimination because she cannot show  
2 that her termination had any causal connection to her alleged disability.

3 Defendants also argue that they have provided a legitimate nondiscriminatory  
4 reason for plaintiff's termination – that she had substantial performance issues and  
5 attendance problems, which were well-documented, and which preceded her alleged  
6 disability. Defendants contend that the evidence shows that plaintiff's performance at work  
7 – when she was there – was not up to standards, and that Hoffman and Ireland had tried to  
8 work with her to ensure that she performed her job satisfactorily and cut down on the  
9 number of non-medical absences. Defendants argue that the evidence shows that plaintiff  
10 was terminated because of her insubordination and continued performance problems,  
11 reasons that had nothing to do with her alleged disability.

12 During the period March 2001 through February 2001, plaintiff was reported as  
13 being absent 261.5 hours, of which 52.5 hours were entered as personal sick leave, 43.25  
14 hours were recorded as family sick leave, 20 hours were leave without pay, and 145.75  
15 hours were entered as vacation. Moreover, it appears from the copies of leave requests  
16 attached to plaintiff's declaration that plaintiff submitted the requests for approval of many  
17 of the absences on the same day, or after the fact. Hoffman claims that plaintiff missed  
18 nearly 30 work hours during the department's busiest time of the year because her mother,  
19 who provided childcare for plaintiff's youngest child, had to go out of town. Defendants  
20 assert that the absences for non-medical reasons far exceeded the number that were  
21 medically certified for any disability, and note that plaintiff has admitted that many of the  
22 absences were for scheduled events unrelated to her alleged disability.

23 In opposition, plaintiff argues, first, that her "anxiety disorder" is a disability under  
24 FEHA if it makes the achievement of a major life activity "difficult." With regard to the IBS,  
25 plaintiff contends that defendants "knew of the IBS long before it was diagnosed" because  
26 prior to the actual diagnosis, plaintiff "was complaining of illness, was missing work  
27  
28

1 because of illness, and was seeking a transfer because of illness.”<sup>4</sup>

2 With regard to the question whether her disability was a motivating factor in her  
3 termination, plaintiff responds that she can prove that it was. She notes that Ireland was  
4 concerned about her absences and deteriorating performance. She argues that the  
5 “unscheduled and unplanned” absences that Ireland refers to in his declaration were  
6 necessitated by IBS flareups, which did not occur according to a schedule. However, she  
7 provides no evidence to support this claim.

8 She also argues that while Hoffman stated that she was terminated because of  
9 performance problems and absenteeism, she had informed Hoffman about the problems  
10 resulting from her disability. For example, she notes that she stated in the May 29, 2002  
11 letter following the May 23, 2002, performance evaluation that just being around people in  
12 the department caused her stress. She also claims that she made similar statements in the  
13 September 10, 2003, meeting at which she was given the September 8, 2003, letter of  
14 warning. Plaintiff makes no attempt to argue that defendants’ articulated reason for  
15 terminating her was pretextual.

16 The court agrees that plaintiff has not provided any evidence showing that she  
17 suffered an adverse action because of her alleged disability. The adverse action that  
18 plaintiff references in her August 2003 administrative charge is the May 23, 2002,  
19 “performance evaluation.” However, the May 2002 performance evaluation cannot have  
20 been prompted by a discriminatory animus based on disability because there is no  
21 evidence that defendants were aware that plaintiff suffered from IBS prior to the certification  
22 from Dr. Davis in May 2003. The fact that plaintiff had been complaining that she was “ill”  
23 was not sufficient to put defendants on notice that she was “disabled,” as the definition of  
24 “disability” is much narrower and more specific than the definition of “illness.”

25 However, plaintiff does not discuss the May 2002 performance evaluation as an  
26 adverse action in the context of a prima facie case of disability discrimination. The only

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27  
28 <sup>4</sup> Plaintiff does not explain how it could be possible for someone to know of a diagnosis  
before the diagnosis has been made.

adverse action plaintiff discusses in her opposition to the motion is the termination. She provides no evidence showing that there was any connection between the termination and the disability.

Given, however, that a plaintiff is required to make only a minimal showing of the prima facie case, see Sischo-Nownejad v. Merced Cmty. College Dist., 934 F.2d 1104, 1110-11 (9th Cir. 1991), the court does not grant summary judgment on the basis that plaintiff has failed to establish a prima facie case. Rather, the court finds that summary judgment should be GRANTED on the basis that plaintiff has not provided any evidence to defeat defendants' showing that they had a legitimate, nondiscriminatory reason for terminating her.

A plaintiff may not defeat a defendant's motion for summary judgment merely by denying the credibility of the defendant's proffered reason for the challenged employment action. See Wallis v. J.R. Simplot Co., 26 F.3d 885, 890 (9th Cir. 1994). Nor may a plaintiff create a genuine issue of material fact by relying solely on the plaintiff's subjective belief that the challenged employment action was unnecessary or unwarranted. Cornwell v. Electra Central Credit Union, 439 F.3d 1018, 1029 n.6 (9th Cir. 2006) (citing Bradley v. Harcourt, Brace & Co., 104 F.3d 267, 270 (9th Cir.1996) (concluding, despite the plaintiff's claims that she had performed her job well, that "an employee's subjective personal judgments of her competence alone do not raise a genuine issue of material fact"))).

In order to counter evidence that the defendant's employment decision was nondiscriminatory, the plaintiff must produce "specific, substantial evidence of pretext." Wallis, 26 F.3d at 890; see also Stegall v. Citadel Broadcasting Co., 350 F.3d 1061, 1066 (9th Cir. 2004). Here, it is undisputed that plaintiff exhibited significant performance problems, and plaintiff does not counter defendants' showing that she behaved in an insubordinate and disrespectful manner. She does not even address the issue, despite the fact that defendants argue in their moving papers that she cannot show pretext.

### 3. Harassment

A prima facie case for discrimination or harassment on grounds of disability under

1 FEHA requires plaintiff to show that she suffers from a disability; that she is otherwise  
2 qualified to do her job; and that she was subjected to adverse employment action because  
3 of her disability. Deschene v. Pinole Point Steel Co., 76 Cal. App. 4th 33, 44 (1999).

4 Defendants argue that plaintiff cannot raise an issue of fact that defendants  
5 subjected her to unwelcome harassment. They assert that other than Hoffman's legitimate  
6 criticism of plaintiff's work performance, plaintiff cannot point to a single example of  
7 Hoffman or anyone harassing her, and that there is no evidence of harassment based on  
8 her disability. They note that there is no evidence that anyone made any offensive  
9 comment to plaintiff or insulted her, based on her disability.

10 In opposition, plaintiff argues that she "complained of constant, continuous  
11 harassment." In support, she cites to her response to defendants' Interrogatory No. 4,  
12 where she stated,

13 Hoffman started chastising Plaintiff for things that were happening. She  
14 talked down to Plaintiff. She treated Plaintiff like she was an idiot. She  
15 repeatedly tried to tell Plaintiff what Plaintiff was supposed to be doing.  
16 Plaintiff knew what she was supposed to be doing. Plaintiff had been doing it  
17 for the previous year without incident. All of a sudden, Hoffman felt the need  
18 to tell Plaintiff every little thing and kept repeating it over and over. There was  
19 always a constant reminder of something that Plaintiff did not do or something  
20 that needed to be done. Plaintiff informed Hoffman, "If you guys would quit  
21 bothering me, I can get some things done." Hoffman was not Plaintiff's direct  
22 supervisor. Hoffman refused to go through Ireland to give Plaintiff direction.  
23 If was evident that Hoffman felt the need to do it herself.

24 The court finds that summary judgment must be GRANTED on the harassment  
25 claim. Plaintiff's interrogatory response constitutes the entirety of the "evidence" that  
26 plaintiff offers in support of her claim that she was harassed on account of her disability.  
27 However, plaintiff has provided no evidence of any specific incident of harassment, or of  
28 any harassing comment made to her or made in her presence – let alone any evidence of  
harassment that was severe or pervasive. Her sole complaint is that Hoffman "harassed"  
her by telling her how to do her job, and by "chastising" her. She asserts that Hoffman told  
plaintiff "every little thing," and "kept repeating it over and over," and that Hoffman talked  
down" to her, and treated her "like she was an idiot." She also complains that Hoffman,  
who was not her direct supervisor, improperly "refused to go through Ireland" to give her

1 direction.

2       These comments and actions cannot support a claim of disability discrimination  
3 claim because they are unrelated to plaintiff's asserted disability. An employee alleging  
4 disability harassment, just as disability discrimination, must ultimately prove that the  
5 adverse employment action taken was based on the disability. See Hersant v. Dep't of  
6 Soc. Servs., 57 Cal. App. 4th 997, 1002 (1997). In other words, plaintiff must prove that  
7 defendants subjected her to harassment because of her disability – not, as she asserts  
8 here, that the alleged harassment was itself the trigger or cause of the disability.

9       Moreover, in order to prevail on a claim of harassment, the plaintiff must show that  
10 the alleged harassment was "sufficiently severe or pervasive" to alter the conditions of her  
11 employment and create an abusive working environment. Fisher v. San Pedro Peninsula  
12 Hosp., 214 Cal. App. 3d 590, 609 (1989). "In determining what constitutes 'sufficiently  
13 pervasive' harassment, the courts have held that acts of harassment cannot be occasional,  
14 isolated, sporadic, or trivial, rather the plaintiff must show a concerted pattern of  
15 harassment of a repeated, routine or a generalized nature." Id. at 610.

16       In showing that the conduct was sufficiently severe or pervasive, plaintiff must prove  
17 both that she subjectively felt the conduct was abusive and that a reasonable person would  
18 find the conduct hostile or abusive. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993).  
19 The objective reasonable person standard is measured by what a reasonable person with  
20 the same fundamental characteristics would have considered abusive. Factors a court may  
21 consider include "the frequency of the discriminatory conduct; its severity; whether it is  
22 physically threatening or humiliating, or a mere offensive utterance; and whether it  
23 unreasonably interferes with an employee's work performance." Id. at 23.

24       Plaintiff has not alleged conduct which is sufficiently severe and pervasive so as to  
25 render her work environment objectively hostile. According to plaintiff, Hoffman harassed  
26 her by yelling, criticizing her work, and telling her how to do her job. With regard to the  
27 claim that Hoffman's "yelling" constituted harassment, "[i]t is a simple fact that in a  
28 workplace, some workers will not get along with one another, and this Court will not elevate



a few harsh words . . . to the level of an actionable offense." McConathy v. Dr. Pepper/Seven Up. Corp., 131 F.3d 558, 564 (5th Cir. 1998). Neither this court nor any court can force the University to require all of its employees to get along with every other employee. To do so would be to interpret the ADA as a "general civility code," which the Supreme Court specifically denounced (with regard to sexual harassment claims under Title VII) in Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998). Plaintiff provides no evidence that any of the "yelling" was physically threatening or humiliating. Occasional hurtful remarks by a coworker or supervisor do not reach the appropriate level of severity. See Harris, 510 U.S. at 23 (frequency of conduct may determine severity).

There is no evidence that the poor performance evaluations constitute harassment, as there is no evidence that Hoffman and Ireland had any knowledge of plaintiff's limitations when the evaluations were written. As for Hoffman telling plaintiff how to do her work, the job of a supervisor is to supervise her subordinates' work, which includes telling them what to do. The fact that Hoffman was not plaintiff's direct supervisor is irrelevant. Plaintiff worked under both Ireland and Hoffman, and had no right to demand that only Ireland give her direction, or that no supervisor tell her how to do her job. In view of plaintiff's apparent low tolerance for stress, the court cannot say that plaintiff did not subjectively view this conduct as "harassment." Nevertheless, no objective observer would find this environment objectively abusive.

#### 4. Failure to Prevent Discrimination and Harassment from Occurring

FEHA makes it an unlawful employment practice for an employer "to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." Cal. Gov't Code § 12940(k). Courts have interpreted this provision as creating a tort sounding in negligence with the usual elements of breach of duty, causation and damages. Trujillo v. North County Transit Dist., 63 Cal. App. 4th 280, 286-87 (1998). The cause of action does not stand alone, but depends on the plaintiff being able to prove he or she was actually the victim of discrimination. Id. Because the court finds that summary judgment

1 must be granted on the discrimination and harassment claims, the court also finds that  
2 summary judgment must be GRANTED on the claim of failure to prevent discrimination and  
3 harassment.

4 5. Failure to Accommodate and Failure to Engage in Good-Faith  
5 Interactive Process

6 As an alternative basis for granting summary judgment on the claims of failure to  
7 accommodate and failure to engage in a good-faith interactive process, the court finds no  
8 triable issue with regard to the University's accommodation of plaintiff's alleged disability,  
9 and finds further that the evidence shows that the University did attempt to engage in the  
10 interactive process with regard to plaintiff's asserted need for accommodation.

11 Under California Government Code § 12940(m), it is "an unlawful employment  
12 practice for an employer . . . to fail to make reasonable accommodation for the known  
13 physical or mental disability of an applicant or employee." Defendants contend that the  
14 claim of failure to accommodate fails because the evidence shows that defendants  
15 accommodated plaintiff's IBS, which they claim was her only disability. They assert that the  
16 only legitimate medical accommodation that plaintiff ever requested and supported with  
17 medical certification was the request for 1-2 days off per month, which request was  
18 granted. Defendants also note that Dr. Davis, the doctor who recommended the  
19 accommodation, testified in his deposition that there was no medical reason that plaintiff  
20 needed to take more than 1-2 days off per month to cope with her IBS.

21 Defendants contend that the only requested accommodation that plaintiff claims the  
22 Regents denied her was the transfer away from Hoffman. They argue, however, that this  
23 requested accommodation was neither reasonable nor feasible under the circumstances,  
24 and would have imposed a hardship on the UCOP. First, defendants contend that a  
25 "transfer" away from a supervisor is not a reasonable accommodation under FEHA. They  
26 assert that a transfer or a reassignment to a vacant position can be considered as an  
27 accommodation only if the disabled employee can no longer perform the requirements of  
28 his or her current position even with some other accommodation. They note that plaintiff's

1 own doctor (Dr. Davis) testified in his deposition that plaintiff's medical condition (IBS) did  
2 not impair her ability to perform her essential job functions, that she did not need to be  
3 transferred away from her co-workers, and that she did not need to move to a new position.

4 In addition, defendants argue that plaintiff's requested accommodation was not  
5 reasonable, as she needed to sit near the other employees in the unit in order to do her job  
6 effectively. The files, the invoices, and the computer system were all located on the same  
7 floor, near Hoffman's office. Hoffman testified in her deposition that much of the accounting  
8 department's work is accomplished through communication within the department, and that  
9 plaintiff worked closely with a financial analyst who needed to communicate with her face-  
10 to-face. In addition, defendants assert, plaintiff had demonstrated that she required  
11 substantial supervision. Defendants also contend that the evidence shows that there were  
12 no other positions available at the time within the IR&C department for which plaintiff was  
13 qualified. Hoffman testified that she investigated whether there were any openings, but  
14 found that there were not, and Howland confirmed that there were no openings.

15 Defendants argue that because Hoffman was the manager of the entire  
16 administrative services department of UCOP, it would not have solved the problem to move  
17 plaintiff to some other unit within the department. Plaintiff would still have had contact with  
18 Hoffman. As for the question of a transfer to some other UCOP department, or some other  
19 UC campus, that would require plaintiff to go through the application and interview process  
20 – it was not something that defendants could do as a “reasonable accommodation.”

21 Defendants assert, moreover, that they were not required to transfer plaintiff,  
22 because her stress and anxiety resulted from a work conflict and are not disabilities. They  
23 argue that where an employee can perform all the duties of her position, but simply finds  
24 herself incapable of working under a particular supervisor because of a personality conflict  
25 that produces anxiety and stress, that employee is not disabled, because she is not limited  
26 from the major life activity of working. They argue that if stress and anxiety caused by a  
27 personality conflict at work were sufficient to constitute a disability, every employee who  
28 had (or created) a conflict with a supervisor could simply decide when he/she wanted a

1 new supervisor as a means of “reasonable accommodation.”

2 In opposition, plaintiff argues that it is undisputed that defendants failed to transfer  
3 her to a location away from Hoffman, as plaintiff had requested. She argues that the FMLA  
4 leave and the shorter work week (accommodations given her for the IBS), were not  
5 “effective” reasonable accommodations because they did not remove her from the source  
6 of the problem (the contacts with Hoffman). Plaintiff asserts that she could not transfer to  
7 another UC department or campus while she was having performance issues, and claims  
8 that the performance issues were caused by defendants’ refusal to grant her requested  
9 accommodation (the move away from Hoffman). She complains that defendants refused to  
10 “explore” accommodation unless she provided them with a medical certification, and  
11 asserts that the insistence on a medical certification was “unlawful” (although she does not  
12 explain why).

13 The court finds that the claim of failure to accommodate fails as a matter of law  
14 because the Regents accommodated plaintiff’s disability. An employer is not required to  
15 provide the exact accommodation that an employee requests, as the right to a reasonable  
16 accommodation does not entitle a disabled employee to the best accommodation or even  
17 to the accommodation of her choosing. Hanson v. Lucky Stores, Inc., 74 Cal. App. 4th 215,  
18 228 (1999). Instead, “the employer providing the accommodation has the ultimate  
19 discretion to choose between effective accommodations, and may choose the less  
20 expensive accommodation or the accommodation that is easier for it to provide . . . . An  
21 employee cannot make his employer provide a specific accommodation if another  
22 reasonable accommodation is instead provided.” Id.

23 Here, the evidence shows that the Regents attempted to address plaintiff’s requests  
24 for accommodation by granting all plaintiff’s FMLA leave requests; approving a reduction in  
25 her work hours; lightening her work load by transferring some of her accounts to other  
26 employees and covering her desk and computer in her absence to assure she was not  
27 overwhelmed upon her return; providing her with a different immediate supervisor after  
28 Ireland left UCOP; offering to move her to a “less noisy” cubicle; and granting her request

1 to take 1-2 days off per month as needed. In light of defendants' showing of the efforts the  
2 University made to accommodate plaintiff, the fact that the University was unable to  
3 transfer her away from her supervisor is insufficient to create a triable issue with regard to  
4 the claim of failure to accommodate.

5 Defendants also argue that plaintiff's claim of failure to engage in a good-faith  
6 interactive process fails because where there is no reasonable accommodation, failure to  
7 engage in an interactive process is of no consequence.

8 Under FEHA, it is an unlawful employment practice for "an employer to fail to  
9 engage in a timely, good faith, interactive process with the employee or applicant to  
10 determine effective reasonable accommodations, if any, in response to a request for  
11 reasonable accommodation by an employee or applicant with a known physical or mental  
12 disability or known medical condition." Cal. Gov't Code § 12940(n); see Velente-Hook v.  
13 Eastern Plumas Health Care, 368 F.Supp. 2d 1084, 1097 (E.D. Cal. 2005).

14 The standard for FEHA violations for failure to engage in the interactive process  
15 tracks the standard for the ADA violations. Id. "The interactive process is a mandatory  
16 rather than a permissive obligation on the part of employers under the ADA." Jensen v.  
17 Wells Fargo Bank, 85 Cal. App. 4th 245, 261 (2000). This obligation is "triggered by an  
18 employee . . . giving notice of the employee's disability and the desire for accommodation."  
19 Id. The process requires good faith communication by both parties as a means of  
20 achieving the shared goal of identifying an accommodation that would enable the employee  
21 to perform his job effectively. Id.

22 Here, defendants assert that plaintiff refused to provide any medical support for her  
23 requests that she be transferred, despite defendants' repeated attempts to communicate  
24 with plaintiff on this issue. Defendants contend that the evidence shows that Caldwell  
25 and/or Howland met with plaintiff on at least eight separate occasions over two years to  
26 discuss her desire to move out of the IR&C department. They repeatedly asked her to  
27 provide a medical certification supporting the request for transfer, which she failed to  
28 provide until after she had received the notice of termination. Of the 21 Kaiser "Visit

1 Verification” forms submitted by plaintiff in 2001, 2002, and 2003, none provided  
2 information other than that she had been seen on a specific date for a “Serious Health  
3 Condition” requiring absence and treatment; had been ill and unable to work for a specified  
4 period of time, often one day; and could return to work on a specific date. Only two of the  
5 forms noted any restrictions on plaintiff’s return to work, measured in days, indicating that  
6 she should participate in modified work schedules for short periods of time, measured in  
7 days, which the University approved. The other 19 forms either indicated that she could  
8 return to work or were silent concerning restrictions.

9 In opposition, plaintiff argues that defendants’ attempt to “formalize the interactive  
10 process” should be rejected. She claims that rather than asking one of the workers’ comp  
11 doctors if a transfer would be effective, or writing a letter asking whether a transfer or  
12 removal to another floor would be an effective accommodation, Howland simply  
13 “formalized” the process by demanding that plaintiff provide a medical certification. She  
14 claims that Howland’s refusal to implement an accommodation suggested by plaintiff until  
15 he had received a medical certificate was unreasonable.

16 Plaintiff contends that she tried to obtain a medical certificate but was unable to do  
17 so until she secured the letter from Dr. Byrns in April 2004, shortly before she received the  
18 notice from Hoffman indicating that the Regents intended to terminate her employment.  
19 Plaintiff argues that there are no cases holding that an employer can refuse reasonable  
20 accommodation once termination proceedings have been started. She claims that her  
21 efforts to comply with Howland’s requests were extensive, but asserts that she “never knew  
22 what he wanted.” In her deposition, she testified that she had “maybe about approximately  
23 three” meetings with Howland, and exchanged some e-mails and received some letters  
24 from him. They also talked on the phone. She also testified that she met “maybe  
25 approximately eight” times with Caldwell and Ireland.

26 Plaintiff admitted that University officials repeatedly asked her to give them access to  
27 her medical records, and that she refused to allow access to her records from Kaiser. She  
28 told Howland that he could “speak freely with Dr. Byrns so they can work out my

1 accommodations, but he was not getting access to my medical records.” She also testified  
2 that she had given the University the medical evaluations she received in connection with  
3 her workers’ compensation claim, and asserted that those evaluations addressed the  
4 causes of her disability and the need for future medical treatment. She characterized the  
5 medical evaluations as “independent medical examinations,” not “just workers’ comp  
6 report[s].”

7 The court finds that summary judgment must be GRANTED on the claims of failure  
8 to accommodate and failure to engage in a good-faith interactive process. The only  
9 disability that plaintiff has arguably established, based on medical diagnosis by a treating  
10 physician, is the IBS. The evidence shows that the first indication the University had that  
11 plaintiff suffered from IBS was on May 20, 2003, when plaintiff informed Ireland of the  
12 diagnosis for the first time. However, she did not provide any medical certification showing  
13 the need for extensive time off or for any particular accommodation. The only certification  
14 she provided was the statement from Dr. Davis, indicating that she “may require” one or  
15 two days of medical leave per month. Dr. Davis listed no other restrictions. Ireland  
16 approved this request.

17 Indeed, plaintiff admitted in her deposition that the University granted all her  
18 requests for accommodation, with the exception of the request for a transfer. Plaintiff  
19 provided no indication that the transfer was medically justified, and she has not made any  
20 showing to create a triable issue with regard to whether a transfer would have been  
21 feasible, given defendants’ evidence that there were no vacancies for plaintiff to transfer to.  
22 Moreover, even if such a vacancy had existed, Hoffman was the manager of the entire  
23 department. Moving plaintiff to another position within the department would not have  
24 minimized contact with Hoffman.

25 The evidence shows that the University also made multiple attempts to engage  
26 plaintiff in the interactive process. Plaintiff acknowledged in her deposition that she had  
27 numerous meetings with Caldwell, Ireland, and Howland, and that she was asked  
28 repeatedly to provide medical documentation to support her claim of disability and requests



1 for accommodations, but failed to do so. In addition, the University contacted plaintiff's  
2 treating physician, Dr. Davis, and requested additional clarification of his diagnosis. Dr.  
3 Davis informed the University that plaintiff was not "preclude[d] from her ability to continue  
4 to work in her usual job," and suggested that the University ask plaintiff to sign a release for  
5 her medical information. Plaintiff, however, refused to complete the consent form.

6 Moreover, the evidence shows that the University granted all plaintiff's requests for  
7 medical leave, reduced her work hours, reassigned some of her work responsibilities, and  
8 offered to move her to a "less noisy" cubicle. The sole request that the University was  
9 unable to grant was plaintiff's request for a "transfer" out of the IR&C department, as  
10 explained above. Such a transfer was not only an unreasonable accommodation, it was  
11 also not feasible, as Howland explains in his declaration.

12 6. Retaliation

13 Plaintiff alleges she was terminated in retaliation for filing DFEH and EEOC  
14 complaints and for requesting a reasonable accommodation, and for taking CFRA/FMLA  
15 leave.

16 a. ADA and FEHA

17 The ADA provides: "No person shall discriminate against any individual because  
18 such individual has opposed any act or practice made unlawful by this chapter or because  
19 such individual made a charge, testified, assisted, or participated in any manner in an  
20 investigation, proceeding, or hearing under [the ADA]." 42 U.S.C. § 12203(a). Similarly,  
21 FEHA provides that it is unlawful for an employer to "discharge . . . any person because the  
22 person has opposed any practices forbidden under [FEHA]." Cal. Gov't Code § 12940(h).

23 In order to establish a prima facie case of retaliation, plaintiff must show 1) that she  
24 engaged in a protected activity; 2) that she was thereafter subjected to an adverse  
25 employment action; and 3) that a causal connection exists between the two. Trent v. Valley  
26 Elec. Ass'n, 41 F.3d 524, 526 (9th Cir. 1994).

27 Defendants argue that plaintiff cannot establish a prima facie case of retaliation  
28 because there is no causal link between her "protected activities" and her termination.

1 They note that she was reprimanded for poor attendance and performance before she ever  
2 complained of having a disability, and that it was only after she received the May 2002  
3 performance evaluation that she started complaining about unspecified health conditions.  
4 Likewise, it was not until nine months after she filed the DFEH charge that she was  
5 terminated.

6 Defendants also contend that plaintiff's retaliation claims fail because she cannot  
7 show specific, substantial evidence of pretext to rebut defendants' legitimate, non-  
8 retaliatory reasons for the decision to terminate her. They note that plaintiff's  
9 insubordination and poor performance were well-documented, and that plaintiff admitted in  
10 her deposition that she missed many hours of work for countless reasons unrelated to her  
11 disability. They claim that the evidence shows that although both Hoffman and Ireland  
12 attempted to address the performance and absenteeism problems with plaintiff and to offer  
13 guidance on how to avoid the problems in the future, plaintiff responded by being  
14 defensive, dismissive, and insubordinate.

15 In opposition, plaintiff argues that she has shown a causal connection to establish a  
16 prima facie case – that is, she filed the DFEH and EEOC complaints on August 11, 2003;  
17 Hoffman held a disciplinary meeting with plaintiff on August 20, 2003, where plaintiff  
18 complained about disability discrimination; Hoffman issued a letter of warning on  
19 September 8, 2003; on September 9, 2003, another disciplinary meeting was held, and  
20 again plaintiff complained about lack of accommodation and harassment; on January 6,  
21 2004, plaintiff was given a performance evaluation stating “needs improvement;” on April  
22 16, 2004, plaintiff was terminated. Plaintiff argues that this is sufficient evidence for nexus.

23 The court finds that the motion must be GRANTED. Plaintiff has arguably  
24 established her prima facie case – she engaged in protected activity (filing DFEH/EEOC  
25 charges and requesting accommodation for her asserted disability); she was later  
26 subjected to an adverse employment action (termination); and a causal connection may be  
27 inferred by the temporal nexus between those two. However, defendants have established  
28 a legitimate, nondiscriminatory reason for the termination, and plaintiff has failed to provide

1 any evidence that the articulated reason was pretextual – let alone “specific, substantial  
2 evidence of pretext.” There is no dispute that plaintiff had numerous performance  
3 problems, along with excessive absences that were unrelated to health or medical issues.  
4 Plaintiff fails to even address the question of pretext.

5 b. FMLA/CFRA

6 Under both FMLA and CFRA, a plaintiff can establish a claim for "retaliation" by  
7 demonstrating that she was terminated on account of her having taken a leave. See  
8 Dudley v. Department of Transp., 90 Cal. App. 4th 255, 261 (2001). In FMLA cases, such  
9 claims are referred to as claims of “interference with rights” under the FMLA. The elements  
10 of an “interference” claim are 1) entitlement to the FMLA right, 2) the employer’s  
11 interference with that right, and 3) a causal connection between the interference and the  
12 harm. Batchelder v. American West Airlines, Inc., 259 F.3d 1112, 1124 (9th Cir. 2001).

13 To establish retaliation in violation of CFRA, a plaintiff must show that (1) the  
14 defendant was an employer covered by CFRA; (2) the plaintiff was an employee eligible to  
15 take CFRA leave; (3) the plaintiff exercised her right to take leave for a qualifying CFRA  
16 purpose; and (4) the plaintiff suffered an adverse employment action, such as termination,  
17 fine, or suspension, because of her exercise of her right to CFRA leave. Dudley, 90 Cal.  
18 App. 4th at 261.

19 Defendants argue that summary judgment should be granted on these claims  
20 because it is undisputed that defendants granted all plaintiff’s requests for leave under the  
21 FMLA/CFRA. They assert that she was reprimanded for taking excessive, unscheduled  
22 absences that were not FMLA-related, and was never reprimanded for taking any FMLA  
23 leave. They note that plaintiff began taking FMLA leave nearly four months after Ireland  
24 issued the 2002 performance evaluation, but was not terminated until two years later.  
25 Moreover, defendants assert that the evidence shows that plaintiff was terminated because  
26 of her performance problems and insubordination, not her attendance problems.

27 In opposition, plaintiff argues that the evidence shows that defendants treated her  
28 “differently” when she returned from FMLA leave. However, she does not say what this

evidence is.

The court finds that the motion must be GRANTED. Plaintiff has not shown any causal connection between her taking the FMLA leave and her termination, and has also failed to show that the Regents' legitimate, nondiscriminatory reasons for termination were pretextual.

**CONCLUSION**

In accordance with the foregoing, the court GRANTS defendants' motion for summary judgment.

**IT IS SO ORDERED.**

Dated: May 1, 2006



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PHYLLIS J. HAMILTON  
United States District Judge